

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

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DEPARTMENT OF JUSTICE
UNITED STATES IMMIGRATION AND
NATURALIZATION SERVICE
UNITED STATES BORDER PATROL
EL PASO, TEXAS
Respondent
and Case No. 6-CA-00077
AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
AFL-CIO, NATIONAL BORDER
PATROL COUNCIL
Charging Party
.

Ricardo Palacios, III
For Respondent
Joseph Swerdzewski, Esq.
Julie Garnett Griffin, Esq.
For the General Counsel
Robert J. Marren
For the Charging Party

Before: JOHN H. FENTON
Chief Administrative Law Judge

DECISION

Statement of the Case

Respondent is charged with having unilaterally disbanded or abolished an evening shift of a SIBAD (Stop Inbound Aliens and Drugs) unit, i.e. without giving the Union an opportunity to negotiate the procedures to be observed in implementing the change and appropriate arrangements for employees adversely affected by such change. It defends on the ground that it customarily shifts assignment about as accomplishment of its mission dictates, so that what happened

here was not a change in conditions of employment giving rise to a bargaining obligation; that the collective bargaining agreement entitled it to take such action; and that even if employment conditions were changed, the impact upon employees was de minimis.

Findings of Fact

In September 1989 Supervisory Border Patrol Agent Ben Chavez recommended that the seven agents under his command be shifted to other duties. They were then functioning, under a rotation system designed to last from September 10 to December 31, as "undercover agents". As such they were assigned to locations where drug smuggling was suspected or anticipated, and wore long hair, beards and clothing that would enable them to blend in with the criminals they were to apprehend. Management of the El Paso Station decided that the evening shift of SIBAD agents was unproductive, and that there was increasing smuggling going on at El Paso international airport, as well as increased alien activity along the border west of El Paso. It therefore determined to split the SIBAD four to twelve shift into two parts, with one segment reporting to the airport (where they were to be neatly dressed and groomed), and the other to the border (where they would be neatly groomed and in uniform).

When the men mustered at 4:00 pm on September 21, Chavez and Field Operations Supervisor Cranston informed them that, effective the following day, they would be reassigned either to the airport or the line watch. According to then Union President Neira and Secretary-Treasurer Polanco they were told the evening shift was being disbanded due to lack of productivity. They were given no indication one way or the other about the duration of the change. Both men professed to have received the impression that it was permanent. The supervisors deny having said anything about the "unit" being abolished, Chavez asserts that he gave a full explanation of the need to redeploy the agents to areas of increased activity for "the time being" i.e., until the activity dropped off. They solicited statements of preference for the four to twelve airport assignment or the three to eleven line watch. Two men, Neira and Polanco refused to choose and were assigned to the airport.

President Neira told Cranston that he could not "do it without negotiating . . . with the Local" and Cranston said "that's the way its going to be". Four days later Neira met with Patrol Agent In Charge Herman and his assistant and

requested bargaining over the change and the impact of the change. Management responded that it had the right to make the change. The same thing occurred the following day at the regular monthly union-management meeting.

On September 27 Neira wrote the Patrol Agent In Charge, again requesting negotiations over "the unilateral change in conditions of employment". On October 4 management responded. It said it was exercising management rights when it reassigned the evening SIBAD unit to specific work locations, thereby "adjusting . . . manpower consistent with the needs of the Service". It asserted that the agents were "performing essentially the same duties at the airport as on the line," concluding thus, as their work was unaffected there was no requirement to bargain.

On November 22 the evening shift SIBAD operation was reestablished, giving rise to the much-contested claim that no shift or unit was abolished, but rather that temporary reassignments occurred which were necessarily indefinite in duration because responsive to unpredictable changes in levels of alien and drug activity or traffic. In addition, testified Chavez, SIBAD continued during the "reassignments" to function as a unit in the sense that he still made out the schedules of the agents, changing only the area in which it discharged its duties. Had it been disbanded, he said, he would not have continued to make out the schedules in the name of the SIBAD unit. During that interim period most of the agents had their days off, or the hours of the evening shift, or both, changed. According to Chavez he has on many occasions moved an entire shift or group, like this SIBAD unit, although he was able to cite only one or two in Las Cruces and one in El Paso which was done on a daily basis and lasted only two days.

Patrol Agent In Charge Herman recounted four occasions when groups of agents were reassigned. Thus, a Foot Patrol unit which worked with city police would, when such work was unavailable, be sent as a unit to the line watch or elsewhere. In 1987 the six-man Horse Patrol was sent to the freightyard work for about 30 days. In connection with the normal four-month rotations in 1989, the SIBAD unit was extended to an additional shift and one City Patrol unit was eliminated, and four months later a third SIBAD shift was added. He also testified that they would regularly - on the line - split a shift, as for example have half the midnight to eight shift report as usual and the other half work from four to noon. And agents are assigned to outstations on the same basis and on a moment's notice.

The reassignments had a number of effects. The four men assigned to the line lost one hour each day of night differential pay. All eight may have lost extra points for purposes of the Officer Corps Rating because SIBAD work, unlike airport or line duty, yielded extra points. There may also have been an adverse effect upon promotion to investigative work. And, finally, there were a number of inconveniences associated with the mere 23 hours in which to shift from slovenly undercover operations to well-groomed, neatly attired agents, as well as appointments to rearrange with doctors and in one case, arrangements to be made to have a school child picked up.

Article 28 of the collective bargaining agreement provides as follows:

ARTICLE 28 - Tours of Duty (Border Patrol Council)

A. The parties to this agreement recognize that the Agency must, to carry out its mission, vary tours of duty. In the interest of good employee morale, it is agreed that changes in an employee's scheduled hours of duty shall be kept to the minimum necessary to accomplish the mission of the Agency.

B. Assignment to tours of duty shall be posted five days in advance in the appropriate work area covering at least a two week period.

C. Except in an emergency, the Agency agrees to schedule eight (8) hours between changes in shifts, and when practical will schedule more time between shifts.

D. Any employee may retain a carbon copy of his DJ-296 and/or Form I-50 if he so desires.

E. The Agency agrees that maximum effort will be made to assign consecutive days off duty.

F. The administrative workweek shall be seven consecutive days, Sunday through Saturday.

G. Breaks in working hours of more than one hour shall not normally be scheduled in any basic workday.

H. When practical, an employee shall be given 24 hours advance notice of individual shift changes.

Exceptions to this provision may be made where there is mutual agreement between the employees and supervisors involved. Individuals involved in a change of tour should be notified of the reasons for the change.

I. Where mutually agreeable to all employees affected, employees may trade shifts out of the normal rotation consistent with the needs of the Service.

Discussion and Conclusions

General Counsel contends Respondent violated section 7116(a)(1) and (5) by failing to provide the Union with an opportunity to bargain concerning the so-called impact and implementation of its decision to eliminate the evening shift SIBAD unit. Subsidiary arguments are that such elimination was a change in conditions of employment, that it had more than de minimis effect on employees, and that Article 28 of the agreement does not constitute a waiver of the Union's right to bargain over the procedures to be observed in implementing the change and appropriate arrangements for adversely affected employees.

Respondent counters that there was no change in employment conditions, i.e. that the SIBAD unit continued to exist, although deployed to different locations doing other kinds of Border Patrol work on a temporary basis. Mixed with this argument are contentions that changes in tours of duty and assignments - indispensable to effective interdiction of fluctuating illegal alien and narcotics traffic - are the order of the day, and that there is no normal or standard pattern of shift rotations, assignments or work locations. Thus what happened here would not represent a departure from, or change in, established conditions, but a continuation of the uncertainty which attends the Patrol's mission. Should such arguments fail, Respondent urges that the Union consented to unilateral changes in Article 28, and that, in any event, the impact of the claimed change at issue was de minimis, so as to give rise to no bargaining obligation.

Putting aside for the moment the somewhat troubling claim that there are, in fact, no established or set employment patterns as regards shifts, days off, or specific kinds of Border Patrol duties on which employers can set reasonable expectations and hence claim to be conditions of their employment, it is at least clear that the reassignment at issue here brought about substantial changes from the work

previously done. The undercover work was functionally very different, was a step up in terms of opportunity for advancement and in requirements, was at different locations and for some was accomplished on a different shift. While there is no persuasive evidence that it was to be a permanent elimination of a shift, it was of indefinite and potential long-term duration. Absent convincing grounds for believing it was but one of many changes in a kaleidoscope of employment patterns where instability was the norm, it was a change requiring negotiations concerning impact and implementation.

Respondent has not come forward with much evidence that chaotic responses to shifting alien and drug traffic are in fact the norm. To the contrary, it appears to have tried to regularize conditions. It has the four-month rotations, and Article 28 attempts to soften impact on those unavoidably taken out of stride. Respondent's witnesses gave anecdotal testimony about several prior changes in units as well as occasional spur-of-the-moment partial changes in shifts. But the testimony is entirely lacking in particulars about such events, including whether or not there was Union involvement. The two changes memorialized in Exhibits R-4 and R-5, show additions to SIBAD shifts. Whether or not the Union was directly told about them, they show from ten days to five weeks of advance notice, thus affording the Union an opportunity to request meaningful bargaining should its constituents desire it. Here the change was effected in 23 hours, in apparent violation of Article 28(B), and without any indication that an emergency existed.

As noted, the broader claim - essentially that the Border Patrol's mission is, for practical purposes, incompatible with collective bargaining - is for me more difficult to deal with. Even the dictionary uses the term "border patrol" as an illustration of a paramilitary unit or operation. A layman can easily appreciate that fixed tours of duty, shifts, days off or geographical deployment of agents simplifies the task of those attempting to enter this country illegally and greatly enhances the prospect of success. Rapid and unscheduled changes in deployment of those defending against it just as obviously will advance the Statute's goal of promoting an efficient and effective government, by use of the element of surprise and avoidance of leaks. The balance to be struck between that goal and the goal of promoting collective bargaining would appear to require more latitude for management here than in the conventional employment scene in an agency, say, like FLRA. Perhaps less time, or notice of a change would be deemed reasonable, or even, on occasion, bargaining after the change.

Wherever such speculation might lead us, the record here is long on management opinions about the need for, and the claimed exercise of, maximum flexibility, but devoid of many facts about what would justify, if anything, what has happened here. This flows from the fact that management simply stiff-armed the collective bargaining agent. It studied its needs here or there for some indefinite time, kicked proposed solutions around and effectively kept the Union out of the process until, as it happened, the Union's president happened to be among those informed, with 23 hours notice, of substantial changes in their work assignments. It is entirely possible the Union's concerns could have been quickly resolved with a little discussion. Whatever, it was simply ignored on the apparent premise that the need for total and instantly available flexibility overwhelms any obligation to discuss such matters with Union representatives.

The mission of a paramilitary group like this might call for very different and highly innovative approaches to bargaining; but it cannot justify its obliteration. If anything, it would appear to call for a maximum effort to make negotiations work within such real constraints. Here, again, Respondent simply refused to talk. The impact described above can hardly be dismissed as de minimis. Article 28, while recognizing that the agency's mission requires that it vary tours of duty, and providing some accommodation to the needs of employees who are buffeted about, contains nothing approaching an express or otherwise clear and unmistakable waiver of the Union's right to negotiate concerning the impact and implementation of changes it must and has every right to make.

Based on the foregoing, I recommend that the Authority issue the following Order:

ORDER

Pursuant to Section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and Section 7118 of the Statute, it is hereby ordered that the United States Immigration and Naturalization Service, United States Border Patrol, El Paso, Texas, shall:

1. Cease and desist from:

(a) Failing and refusing to furnish the National Border Patrol Council, American Federation of Government Employees, AFL-CIO, prior notice of, and an opportunity to

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to furnish the National Border Patrol Council, American Federation of Government Employees, AFL-CIO, prior notice of, and an opportunity to negotiate concerning the impact and implementation of changes in conditions of employment for bargaining unit employees, including the indefinite elimination of shifts in the El Paso station.

WE WILL, upon request, negotiate with the National Border Patrol Council, American Federation of Government Employees, AFL-CIO, concerning the impact and implementation of the indefinite elimination of the evening shift of the SIBAD unit on September 22, 1989.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

(Activity)

Dated: _____ By: _____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Dallas Regional Office, whose address is: 525 Griffin Street, Suite 926, LB-107, Dallas TX 75202, and whose telephone number is: (214) 767-4996.

negotiate concerning the impact and implementation of, changes in conditions of employment for bargaining unit employees, including the indefinite elimination of shifts in the El Paso station.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

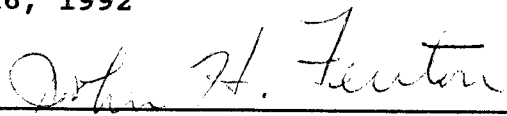
2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Negotiate, upon request, with the National Border Patrol Council, American Federation of Government Employees, AFL-CIO, concerning the impact and implementation of the indefinite elimination of the evening shift of the SIBAD unit on September 22, 1989.

(b) Post at its facilities throughout the United States Immigration and Naturalization Service, United States Border Patrol, El Paso Sector, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Chief Patrol Agent for the El Paso Sector, United States Immigration and Naturalization Service, United States Border Patrol, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Dallas Regional Office, Federal Labor Relations Authority, Dallas Regional Office, 525 Griffin Street, Suite 926, LB-107, Dallas TX 75202, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, April 16, 1992



JOHN H. FENTON
Chief Administrative Law Judge